

United States District Court
Central District of California

HOLLYWAY CLEANERS &
LAUNDRY COMPANY INC.;
MILTON CHORTKOFF; BURTON
CHORTKOFF; EDYTHE
CHORTKOFF; and WILMA
CHORTKOFF.

Plaintiffs.

V.

CENTRAL NATIONAL INSURANCE
COMPANY OF OMAHA INC.; and
DOES 1 through 30,

Defendants

Case No: 2:13-cv-07497-ODW-E

FINDINGS OF FACT & CONCLUSIONS OF LAW AS TO THE FIRST PHASE OF TRIAL

I. INTRODUCTION & PROCEDURAL HISTORY

The Court has recited the facts of this case in several other orders, and incorporates that discussion here by reference. (See, e.g., Nov. 7, 2016 Order, ECF No. 93.) Briefly, Plaintiffs Hollyway Cleaners & Laundry Company Inc., Milton Chortkoff, Burton Chortkoff, Edythe Chortkoff, and Wilma Chortkoff claim they are

1 entitled to insurance coverage from Defendant Central National Insurance Company
2 of Omaha Inc. They seek a defense and indemnification, under an insurance policy
3 (the “Policy”) issued in the 1980s, to a lawsuit filed against Plaintiffs for chemical
4 spills that occurred at a dry cleaner owned and operated by Plaintiffs in Echo Park,
5 California (the “Echo Park Property”).

6 On November 7, 2016, the Court held that Defendant owed Plaintiffs a duty to
7 defend under the Policy because there was at least a potential for coverage.
8 (*Id.* at 12.) The Court also held that Plaintiffs were not entitled to independent
9 counsel. (*Id.* at 12–13.)

10 Of particular importance to the Court’s analysis here is Defendant’s new claim
11 that the Echo Park Property was not covered by the Policy. Defendant raised this
12 defense for the first time in the eleventh hour, despite the fact that all parties, this
13 Court, and the Ninth Circuit had assumed the Policy covered the Echo Park Property.
14 (*See* Transcript January 17, 2017, ECF No. 127 (discussing newly raised defense);
15 Def.’s Tr. Brief 5–7, ECF No. 122.) In light of this new defense, the Court bifurcated
16 the issue of whether the Policy covers the Echo Park Property. (*See* Min. Order, ECF
17 No. 159; Order, ECF No. 171.) Since then, in an effort to sort out this archeological
18 endeavor, the Court held multiple hearings addressing the contents of the Policy, and
19 whether it covers the Echo Park Property.
20

21 Neither Defendant nor Plaintiffs have the original copy of the Policy. On
22 December 28, 2017, Plaintiffs requested an evidentiary hearing to explore the
23 foundation underlying Jeffery Ogle’s testimony regarding the genesis of the Policy.
24 (Req. for Evid. Hearing (“Request”), ECF No. 162.) Ogle worked for Defendant and
25 claimed to have compiled the Policy for purposes of this litigation. (*See* Order 2–4,
26 ECF No. 171.) On February 14, 2018, the Court heard Ogle’s testimony. (Mins.,
27 ECF No. 166.) After hearing his testimony, the Court excluded Form PCL 7-81 from
28 the Policy because Ogle could not properly lay foundation for its inclusion in the

1 Policy. (Order, ECF No. 171.) The parties then stipulated and lodged with the Court
2 a collection of documents, totaling 17 pages, which they agree comprise the Policy.
3 (Stip., Ex. A (the “Policy”), ECF No. 172.)

4 In its Order excluding Form PCL 7-81 from the Policy, the Court also
5 articulated several issues to be addressed at the first phase of the bifurcated trial,
6 which all relate to “Claim No. 1: Declaratory Relief for Duty to Defend,” as set forth
7 in the parties’ Proposed Pretrial Order. (*Id.* at 3–4; Proposed Pretrial Order, ECF No.
8 135-1.) On August 7, 2018, the Court heard the first phase of the bifurcated trial,
9 including arguments of counsel, and the testimony of Plaintiffs’ expert, David
10 Frangiamore.

11 Having carefully reviewed and considered the evidence and the arguments of
12 counsel as presented at trial and in their written submissions to date, the Court issues
13 the following findings of fact and conclusions of law pursuant to Federal Rule of Civil
14 Procedure 52(a). To the extent that any finding of fact constitutes a conclusion of law,
15 it is adopted as such, and vice versa.
16

17 II. DISCUSSION

18 It is undisputed that the original Policy has long been lost or otherwise
19 unavailable. However, the fact that an insurance policy is lost or destroyed does not
20 prohibit an insured from asserting coverage under the missing policy, if the insured
21 can prove its contents through other means. *Dart Indus., Inc. v. Commercial Union*
22 *Ins. Co.*, 28 Cal. 4th 1059, 1070–71 (2002) (discussing and approving of two cases
23 where insured proved it was entitled to coverage where the policy was lost, but the
24 contents were proven through secondary evidence). The burden rests on the insured to
25 prove it was covered by the policy, and on the insurer to prove the substance of any
26 policy provision essential to the insurer’s defense, including any applicable exclusion
27 or limitation. *Id.* at 1071.

28 At the hearing, Plaintiffs presented the testimony of their expert, David

1 Frangiamore, and the Policy to establish coverage.

2 **A. David Frangiamore**

3 A party may present testimony of a witness to establish the contents of a lost or
4 destroyed insurance policy. *Id.* at 1070; *see also Rogers v. Prudential Ins. Co.*, 218
5 Cal. App. 3d 1132, 1137 (1990) (holding where an insurance policy is lost or
6 destroyed, a party may prove its contents through “an unsigned copy or by oral
7 evidence”). Federal Rule of Evidence 702 permits testimony from expert witnesses.
8 In the context of insurance coverage cases, courts permit experts to opine as to the
9 custom and practice of insurance companies generally. *See Hangarter v. Provident*
10 *Life & Acc. Ins. Co.*, 373 F.3d 998, 1015–19 (9th Cir. 2004) (discussing evidentiary
11 requirements for admitting expert testimony in insurance context); *Barten v. State*
12 *Farm Mut. Aut. Ins. Co.*, CV-12-00399-TUC-CKJ, 2015 WL 11111309, at *5 (D.
13 Ariz. Apr. 8, 2015) (allowing testimony regarding “insurance standards, practices, and
14 procedures and...whether Defendant’s conduct was inconsistent with those standards,
15 practices, and procedures”).

16 Frangiamore testified:

17

- 18 • He is a former in-house attorney for an insurance company, and also
19 acted as a claims adjuster, and then claims manager for nearly a decade;
- 20 • He adjusted thousands of claims in his career, and now acts as an expert
21 witness—often addressing claims involving dry cleaners;
- 22 • He is familiar with insurance policies written in the 1980s because many
23 of the claims he adjusted concerned policies issued then, despite the losses
24 occurring in the 1990s;
- 25 • He has reviewed, analyzed, and previously adjusted claims including
26 several of the forms that comprise the Policy, including Form L 9260
27 (Policy 12–13);
- 28 • Insurance companies issue many policies covering “operations” of the

1 insured or “locations,” and sometimes both;

2

- 3 • He opines that the Policy’s language is more consistent with providing
- 4 coverage for the operations of the insured, as opposed to specific
- 5 locations of the insured;
- 6 • To evaluate coverage, a claims adjuster looks to the declarations page of
- 7 the insurance policy, and then evaluates what forms, including any
- 8 supplements or endorsements, comprise the policy.

9 While Frangiamore’s testimony may provide some insight to the custom and
10 practice of the insurance industry generally, it is not determinative of whether the
11 Policy covered the Echo Park Property. The Court must interpret the Policy, as a
12 matter of law. *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (1995).

13 **B. The Policy**

14 As discussed previously, the Court already determined that the terms of the
15 Policy afford the possibility of coverage, and triggered Defendant’s duty to defend.
16 (Order, ECF No. 93.) Thus, the Court need only examine whether the Policy provides
17 coverage to the Echo Park Property, specifically, and whether Plaintiffs have met their
18 burden to establish the material terms of the insurance policy, since the original is
19 unavailable.

20 The insured generally has the burden of proving the existence of an insurance
21 contract and its material terms. *Dart*, 28 Cal. 4th at 1071–72 (citing *Nat'l Am. Ins.*
22 *Co. v. Certain Underwriters at Lloyd's London*, 93 F.3d 529, 534 (9th Cir. 1996)).
23 Here, the parties stipulated to the existence of the Policy, and the documents
24 comprising it. (Policy.) Even though some forms included in the Policy appear not to
25 have been filled out, the Policy sufficiently sets forth the material terms, as follows:

26

- 27 • The Declarations page identifies the Plaintiffs as the named insureds:
28 “HOLLYWAY CLEANERS & LAUNDRY COMPANY, INC. & MILT
CHORTKOFF, BURT CHORTKOFF INDIVIDUALLY, AS THEIR

1 INTEREST MAY APPEAR.” It also identifies the premiums and period
2 of coverage. (Policy 1.)

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- 4 Form L 9260 provides what risks are insured, the exclusions that may
5 apply, and the limits of liability. (Policy 12–13.) *See Dart*, 28 Cal. 4th at
6 1071–72 (explaining that material terms of policy may change depending
7 on loss and type of coverage afforded); *Nat'l Am. Ins. Co.*, 93 F.3d at 534
8 (citing Cal. Ins. Code § 381) (discussing material terms of insurance
9 contract); *see also Servants of Paraclete, Inc. v. Great Am. Ins. Co.*, 857
10 F. Supp. 822, 828–29 (D. N.M. 1994) (applying New Mexico law, and
11 discussing proof necessary to establish material terms of lost policy).

12 The sticking point is that the Echo Park Property is not specifically listed on
13 Form L 9260,¹ or on the Declarations page of the Policy. (Policy 1, 12–13.) It is,
14 however, identified in a later amendment to the Policy, which occurred after Valetor,
15 Inc. was substituted as the named insured on the Policy.² (*Id.* at 6.) Defendant argues
16 that this indicates that the Echo Park Property was not covered by the Policy until
17 Defendant issued this additional declaration. This interpretation of the Policy is
18 unavailing for two reasons.

19 First, the Schedule of Insurance that Defendant contends added the Echo Park
20 Property to the Policy states, “The following declarations apply to endorsements
21 attached at inception of the policy.” (Policy 6.) The plainest reading of this sentence
22 is that the coverages and property described in the Schedule of Insurance apply to the
23 endorsements and supplements that were attached at the inception of the Policy. *See*
24 *Garamendi v. Mission Ins. Co.*, 131 Cal. App. 4th 30, 42 (2005) (citations omitted)

25

26 ¹ Form L 9260 is blank, including the portion that is supposed to identify the specific policy to which
27 it applies. (*See* Policy 12.)

28 ² While not determinative of the Court’s analysis here, Plaintiffs claim that Valetor, Inc. began
operating the dry cleaning business at the time of the substitution, but that Plaintiffs remained the
owners of the Echo Park Property.

1 (“The plain meaning of policy language is ‘the meaning a layperson would ordinarily
2 attach to it.’”) It is undisputed that the Policy identifies Form L 9260, as an
3 endorsement attached at the inception of the Policy. (Policy 1.) Accordingly, the
4 coverages provided in Form L 9260 apply to the Echo Park Property.

5 Second, and most persuasive, Form L 9260 provides:

6 COVERAGE PART	7 THIS FORM	8 L 9260 9 (Ed. 1-73)
10 COMPREHENSIVE GENERAL LIABILITY INSURANCE		
11 For attachment to Policy No. _____, to complete said policy.		
12 ADDITIONAL DECLARATIONS		
13 Location of all premises owned by, rented to or controlled by the named insured <small>ENTER 'SAME' IF SAME LOCATION AS ADDRESS SHOWN IN ITEM 5 OF DECLARATIONS</small>		
14 Interest of named insured in such premises <small>CHECK BELOW</small>		
15 <input type="checkbox"/> Owner <input type="checkbox"/> General Lessee <input type="checkbox"/> Tenant <input type="checkbox"/> Other _____		
16 Part occupied by named insured <small>ENTER BELOW</small>		

17 (Policy 12.) This section provides “COMPREHENSIVE GENERAL LIABILITY
18 INSURANCE” to the “[l]ocation of all premises owned by, rented to or controlled by
19 the named insured.” (*Id.*) Just as above, the plainest reading of this sentence provides
20 coverage for “all premises owned by, rented to or controlled by the named insured.”
21 *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 666–67 (1995), as
22 modified on denial of reh’g (Aug. 31, 1995) (“If the meaning a layperson would
23 ascribe to the language of a contract of insurance is clear and unambiguous, a court
24 will apply that meaning.”). The reasonable expectations of the insured reinforces this
25 conclusion: A dry cleaner business that identifies its mailing address on the
26 declarations page of an insurance contract would expect that this sentence provides
27 coverage for all of the properties it controls. *Waller*, 11 Cal. 4th at 28–29 (finding that
28 reasonable expectations of an insured may reinforce plain meaning of insurance
contract).

29 In parentheses after the sentence described above, the Form says, “(Enter
30 ‘same’ if same location as address shown in item of declarations.”) (*Id.*) Defendant
31 argues that this demonstrates that the insured was required to specifically list the
32 covered properties. Plaintiffs counter that, given the broad grant of coverage for “all
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1 premises owned by [the insured]," if Defendant contends that this portion of the Form
2 limited the applicable coverage, then the burden is on Defendant to prove it. *See Dart*,
3 28 Cal. 4th at 1071–72 (holding burden on insurer to prove exclusion where original
4 policy is lost). The Court agrees.

5 In the simplest sense, the fact that there is limited space to identify properties
6 after the direction to "enter 'same'" leads the Court to interpret the prior sentence as a
7 broad grant of coverage encompassing all of the named insured's premises. To the
8 extent Defendant contends that the direction in parentheses limits Plaintiffs' coverage
9 in some way, Defendant must prove it, and it has not done so. *Id.* Finally, if
10 Defendant contends that the "enter same" directive is somehow ambiguous, then the
11 Court must interpret the Policy in favor of coverage. *AIU Ins. Co. v. Superior Court*,
12 51 Cal. 3d 807, 822 (1990) ("Because the insurer writes the policy, it is held
13 'responsible' for ambiguous policy language, which is therefore construed in favor of
14 coverage."). Accordingly, the Court finds that Plaintiffs met their burden of
15 establishing the material terms of a lost insurance policy, and the most reasonable
16 interpretation of those terms is that Policy covered the Echo Park Property.³
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26 ³ Plaintiffs presented other theories as to why the Echo Park Property is entitled to coverage,
27 including because: 1) they were "additional insureds" as landlords under the Policy; and 2) there was
28 never a valid cancellation of the Policy when Defendant substituted Valetor, Inc. as the named
insured. However, the Court declines to address these theories given its interpretation of the Policy
detailed above.

III. CONCLUSION

As set forth above, the Policy provided coverage to the Echo Park Property. The Court previously explained why Defendant owed Plaintiffs a duty to defend in the underlying action. (Order, ECF No. 93.) In light of these findings, the Court **ORDERS** the parties to meet and confer, and submit a **revised Proposed Pretrial Conference Order** before **October 1, 2018**. The Court sets a **Pretrial Conference for October 22, 2018, at 1:30 p.m., and Trial for October 30, 2018, at 9:00 a.m.**

IT IS SO ORDERED.

August 13, 2018

OTIS D. WRIGHT, II

UNITED STATES DISTRICT JUDGE